

**PROPOSED CLASS PROCEEDING
FEDERAL COURT**

BETWEEN:

Janet Donaldson

Plaintiff

AND:

**Swoop Inc.
Westjet Airlines Ltd.
Air Canada
Air Transat A.T. Inc.
Sunwing Airlines Inc.**

Defendants

**NOTICE OF MOTION
(Class Action Certification, Rule 334.15)**

TAKE NOTICE THAT the Plaintiff will make a motion to the Court before Mr. Justice Lafrenière at a time to be fixed by the Court at Vancouver, British Columbia or in writing under Rule 369, as the Court will permit.

THE MOTION IS FOR ORDERS THAT:

1. This Action is certified as a class proceeding;
2. The class (hereafter "**Class**" or "**Class Members**") is defined as:

Persons residing anywhere in the world who before March 11, 2020 entered into a Contract of Carriage with any of the Defendants for travel on a flight operated by a Defendant on a trip that was scheduled to commence between March 13, 2020 until the date the Government of Canada withdraws all travel advisories for COVID-19, including a further subclass of Class Members whose flights from March 13, 2020 until May 31, 2020 (or any other date to be determined by the Court) were cancelled and/or suspended by a Defendant.

But excluding: (1) persons who already cancelled their own itineraries before the Government of Canada's global travel advisory on March 13, 2020; and (2) persons who had a full refund to the original form of payment in progress prior to March 27, 2020.

3. The Plaintiff be appointed as the representative plaintiff for the Class;
4. The Common Questions are stated to be those set out in **Schedule "A"** to this Notice of Motion;
5. The nature of this Class proceeding is stated to be collective recovery of monies paid and damages, including special, general, nominal, and/or punitive damages in connection with the refund of cancelled flights during COVID-19;
6. The relief sought by the Class is stated to be:
 - a. an Order under Rule 377 (or alternatively Rules 373 and/or 374) that the monies received by the Defendants in relation to the Class Members' Contracts of Carriage be paid into Court pending final disposition;
 - b. a declaration that the Contracts of Carriage between each of the Class Members and a Defendant have been terminated pursuant to the doctrine of frustration on March 13, 2020;
 - c. further, or in the alternative, a declaration that the Contracts of Carriage between each of the Class Members and a Defendant include an expressed or implied term that Class Members are entitled to a full refund if carriage is no longer possible for reasons outside the control of the Class Member, and that each of the Defendants have breached this term;
 - d. further, or in the alternative, a declaration that the Defendants have breached the duty to perform the Contracts of Carriage in good faith;
 - e. an Order that the Defendants refund to the original form of payment the monies received in relation to the Class Members' Contracts of Carriage;
 - f. further, or in the alternative, an Order that the Defendants pay damages to each Class Member including: special damages, general damages, nominal damages, and/or punitive damages;
 - g. an Order pursuant to Rule 334.28(1) and (2) for the aggregate assessment of the refund of monies to the Class Members;
 - h. an Order pursuant to Rule 334.26-334.27 and 334.28(3) for individual assessment of compensatory damages to members of the Class and the appointment of a special referee for assessing each individual case using special modes of proof as directed by the Court;

- i. pre-judgment and post-judgment interest pursuant to sections 36 and 37 of the *Federal Courts Act*, RSC 1985, c. F-7; and
 - j. such further and other relief as this Honourable Court deems just.
7. The Litigation Plan attached as **Schedule “B”** to this Notice of Motion is approved as a workable method of advancing the litigation;
 8. The Notice Plan included in the Litigation Plan is approved as a workable method of contacting the Class Members;
 9. The Defendants pay the costs of the Notice Plan;
 10. Class Members who wish to opt-out of the Action must do so in writing within thirty days of the date of this Order;
 11. The Defendants provide counsel for the Plaintiff with a list of Class Members and those Class Members' contact information following the expiry of the opt-out period in paragraph 10 of this Order;
 12. Both the Plaintiff and Defendants bear their own cost for this certification motion, pursuant to Rule 334.39; and
 13. Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THIS MOTION ARE:

The Certification Motion Could be Determined in Writing under Rule 369

1. There are strong grounds to determine the class action certification motion in writing on the basis of written representations:
 - a. The test for class action certification is settled.

Brake v. Canada (Attorney General), 2019 FCA 274 at para. 17
 - b. Class action certifications are often straightforward, and not complex.

Brake v. Canada (Attorney General), 2019 FCA 274 at paras. 1-7 and 19
 - c. There is urgency in determining the certification motion as the Defendants have issued vouchers and imposed expiry dates of less than two years; the Class Members would need legal clarity before that purported expiry date.
 - d. This certification motion likely does not hinge on a witness' credibility.

- e. The motion can be fairly disposed of without further delays, especially backlogs that may arise from the COVID-19 situation, and additional expense of an oral hearing.
2. The Court should fix an expedited timeline for the items below:
 - a. Defendants' affidavits in response under Rule 334.15(4); and
 - b. Written representations of the parties, including:
 - i. Plaintiff's written representations in-chief;
 - ii. Defendants' written representations in response; and
 - iii. Plaintiff's written representations in reply, if necessary.

Test for Class Action Certification (Rule 334.15)

3. Rule 334.16(1) provides that a motion for class action certification be determined by a judge of this Court.
4. An action shall be certified as a class proceeding if the requirements set out in Rule 334.16(1) of the *Federal Court Rules* are met. The underlying issues are wholly or predominantly questions of law with little factual dispute.
5. The pleadings disclose various causes of action against the Defendants, including:
 - a. a cause of action that the contracts have been frustrated by an external event and any benefits received by the Defendants be returned;
 - b. Defendants' breach of contractual term(s) that mandates a refund to the Class Members; and/or
 - c. Defendants' subsequent conduct towards the Class Members being a breach of the duty to perform contracts in good faith.
6. All of the Class Members have a claim for some or all of the following remedies:
 - a. Refund of the benefits received by the Defendants to the Class Members' original forms of payment (including credit card, debit card, and/or points redemption);
 - b. Alternatively, monetary damages of an equivalent amount of the benefits received and/or retained by the Defendants; and/or
 - c. Damages, including but not limited to punitive damages, nominal damages, and/or damages for inconvenience to the Class Members.

7. There is an identifiable class of two or more persons that fit within the Class. The number of Class Members, and their identity, are within the exclusive knowledge of the Defendants and could be gleaned from their records at the claims administration phase.
8. The claims of the Class Members raise common questions of law and/or fact as outlined in Schedule A. One common issue suffices for the requirement under Rule 334.16(1)(c), and answering the questions in Schedule A will advance the litigation for the Class Members.
9. A class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law and/or fact. Class Members are so numerous that there exists no other viable means to resolve the common issues except through a class proceeding.
10. The proposed representative will fairly and adequately represent the interests of the Class, has produced a workable plan for advancing this litigation and notifying other Class Members, do not have an interest in conflict with the interests of other Class Members on the common questions of law and fact, and has set out a summary of her arrangement regarding fees and disbursements.
11. It is just, and reasonable that the Defendants pay the cost of the Notice Program since there is no dispute that they have taken the actions complained of.
12. Further grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING EVIDENCE will be relied upon at the hearing of the motion:

1. The Affidavit of Janet Donaldson, made on April 23, 2020;
2. The Pleadings filed herein, including documents served under Rule 206; and
3. Further material as counsel may advise and this Honourable Court may permit.

Dated: April 23, 2020

Champlain Avocats

Jérémie John Martin
Sébastien A. Paquette
Champlain Avocats
200-1434 Sainte-Catherine Street West
Montreal, Québec, H3G 1R4
Tel: 514-944-7344
jmartin@champlainavocats.com
spaquette@champlainavocats.com

Simon Lin

Simon Lin
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, British Columbia, V5C 6C6
Tel: 604-620-2666
simonlin@evolinklaw.com



for Joel Zanatta
Kevin McLaren
Alexia Majidi

Hammerberg Lawyers LLP
1200 W 73rd Ave Suite 1220
Vancouver, BC V6P 6G5
Tel: 604-269-8500
jzanatta@hammerco.net
kmclaren@hammerco.net
amajidi@hammerco.net

Mathew Good

Mathew P. Good
Mathew P. Good Law Corporation
204 - 1650 Duranleau Street
Granville Island
Vancouver BC V6H 3S4
Tel: 604-363-6295
mat@goodbarrister.com

SCHEDULE "A" - PROPOSED COMMON ISSUES

Liability

1. Were the Class Members' Contracts of Carriage with the Defendants frustrated on or about March 13, 2020 from the travel advisory and health warnings issued by the Government of Canada?
2. Further, or alternatively:
 - a. Did the Contracts of Carriage include expressed and/or implied terms that Class Members are entitled to a full refund if carriage is no longer possible for reasons outside the control of the Class Members?
 - b. Did the Contracts of Carriage include any express provisions that relieve that Defendant from issuing a refund in these circumstances?
 - c. Whether the future vouchers and/or credits issued by the Defendants could extinguish the Class Members' right to a refund?
3. If the Court finds in favour of the Plaintiff on either of the preceding grounds, whether the Defendants breached the duty to perform contracts in good faith, giving rise to payment(s) of further damages?

Remedies

4. Are the Class Members entitled to damages equivalent to the original purchase price (including any taxes and fees), nominal damages for breach of contract, and/or punitive damages?
5. Can an aggregate assessment be made for the amounts in the preceding question, pursuant to Rule 334.28(1) of the *Federal Court Rules*?
6. Does the Defendants' conduct constitute exceptional circumstances under Rule 334.39(1) such that the Defendants should be ordered to pay costs of this action?

Procedure for Addressing Residual Individual Issues (Rule 334.28(3))

7. What special mode of proof should the Court adopt if any individual issues remain to be adjudicated, or if Class Members seeks to claim further damages specific to their individual circumstances, such as additional inconvenience?

SCHEDULE "B" - PROPOSED LITIGATION PLAN

CLASS COUNSEL AND THE RESOURCES AVAILABLE TO PROSECUTE THE ACTION

1. The Plaintiff's counsel group is comprised of the following law firms ("**Class Counsel**"), all of which possess the requisite knowledge, skill, experience, personnel, and financial resources to prosecute this class action:

Law Firm	City	Province
Champlain Avocats	Montréal	Québec
Evolink Law Group	Burnaby	BC
Hammerberg Lawyers LLP	Vancouver	BC
Mathew P. Good Law Corporation	Vancouver	BC

Class Counsel anticipate that prosecuting this action will require:

- (a) reading, organizing, profiling, scanning, managing and analyzing standard contract documents, internal policy documents of the Defendants, internal correspondence of the Defendants, and Defendants' correspondence with any government entity in relation to refunds in these circumstances; and
- (b) the analysis of legal issues, including the doctrine of frustration as it applies to global pandemics, and the law on implied terms of contracts.

THE COMPOSITION OF THE CLASSES

2. At present, the Class is defined as (the "**Class**" or "**Class Members**"):

Persons residing anywhere in the world who before March 11, 2020 entered into a Contract of Carriage with any of the Defendants for travel on a flight operated by a Defendant on a trip that was scheduled to commence between March 13, 2020 until the date the Government of Canada withdraws all travel advisories for COVID-19, including a further subclass of Class Members whose flights from March 13, 2020 until May 31, 2020 (or any other date to be determined by the Court) were cancelled and/or suspended by a Defendant.

But excluding: (1) persons who already cancelled their own itineraries before the Government of Canada's global travel advisory on March 13, 2020; and (2) persons who had a full refund to the original form of payment in progress prior to March 27, 2020.

REPORTING TO AND COMMUNICATING WITH CLASS MEMBERS

3. Based on publicly available information, Class Counsel estimates that there are at least tens of thousands of Class Members.
4. Class Counsel have developed a website for this proposed class proceeding at <http://evolinklaw.com/covid19-refunds/> (the "**Website**"). Current information on the status of the action is posted on the Website and will be updated regularly. Copies of some of the Court decisions and other information relating to the action will be accessible on the Website.
5. The Website contains the contact information of Class Counsel and allows Class Members to submit enquiries to Class Counsel. Enquiries are sent directly to Class Counsel who will promptly respond.
6. The Website contains a mailing list subscription form for Class Members to complete in order to receive timely updates of the action.

PLEADINGS

7. The Plaintiff will ask the Court to order the Defendants to deliver their Statements of Defense prior to certification, in accordance with the *Federal Court Rules*.

LITIGATION SCHEDULE

8. The Plaintiff will ask the case management judge to set an expedited litigation schedule for:
 - a. pre-certification documentary production, if the Court finds necessary;
 - b. Plaintiff's certification materials (already served and filed);
 - c. Defendants' responding certification materials to be filed;
 - d. cross-examinations, if required;
 - e. delivery of experts' reports, if any;
 - f. certification hearing in writing or orally;
 - g. document discovery and examinations for discovery; and
 - h. the determination of the common issues (either on a summary judgment motion, summary trial motion, or a conventional trial).
9. The Plaintiff may also ask that the litigation schedule be amended from time to time as required.

DOCUMENT DISCOVERY, EXCHANGE AND MANAGEMENT

10. As this action and the common issues involve primarily questions of law and contractual interpretation, the Plaintiff does not anticipate an extensive discovery of documents relating to the common issues.

11. The Defendants possess most, if not all, of the documents relating to the number of flights cancelled, the number of affected Class Members, the quantum for each Class Member, and each Class Members' contact information. These documents will be produced to Class Counsel through the normal production, cross-examination and examination for discovery processes.
12. The Plaintiff intends to seek leave from the Court to truncate the timeline for document discovery.
13. Class Counsel anticipate and are able to handle the intake and organization of the documents that will likely be produced by the Defendants before or after certification. Class Counsel will use data management systems to organize, code, and manage the documents.
14. If required, the documents may be maintained on a secure, password-protected Internet website for access by Class Counsel.
15. The same data management systems will be used to organize and manage all relevant documents in the possession of the plaintiff although the plaintiff have virtually no documentation relating to the common issues other than what is available in the public domain.

PLAINTIFF'S EXPERT(S)

16. The Plaintiff does not intend to adduce expert evidence for certification.
17. At this time, the plaintiff does not intend to adduce expert evidence for trial but will re-assess the situation after examinations for discovery.

THE FOLLOWING TERMS OF THIS PLAN PRESUPPOSE THE COURT CERTIFIES THIS ACTION AS A CLASS PROCEEDING

NOTICE OF CERTIFICATION AND OPT-OUT PROCEDURE

18. If the action is certified as a class proceeding, the Court will be asked to:
 - a) settle the form and content, in both English and French, for notification of the certification and the opt-out period, within 30 days of the issuance of the certification order;
 - b) set an opt-out date of thirty (30) days after the date of the order certifying the action as a class proceeding; and
 - c) settle the means by which the notice of the certification and the opt-out period will be given (the "**Notice Program**", below in paragraph 19).

19. The plaintiff proposes that the Notice of Certification be disseminated in accordance with the following Notice Program:

- a) published once in a half page advertisement in the Montreal Gazette, the National Post, and the national edition of the Globe & Mail (in English or French);
- b) prominently posted on the Defendants' website(s);
- c) posted on Class Counsel's website;
- d) a Facebook Post on each Defendants' Facebook account and "anchored" to the top of their wall/page for the duration of the notice period;
- e) a Twitter tweet on each Defendants' Twitter account and "pinned" to the top of their Twitter feed for the duration of the notice period;
- f) an e-mail sent by each Defendant to each Class Members' last known e-mail address; and
- g) delivered by Class Counsel to any Class Member who requests it.

20. The Plaintiff will request that the costs of the Notice Program be paid for by the Defendants.

21. The Plaintiff proposes the following opt-out procedure:

- (a) a person may opt-out of the class proceeding by sending a written election to opt-out to a person designated by the Court before a date fixed by the Court;
- (b) a guardian may opt-out a minor or a person who is mentally incapable without leave of the Court; and
- (c) no Class Member may opt-out of the class proceeding after the expiration of the opt-out period set by the Court except by permission of the Court.

EXAMINATIONS FOR DISCOVERY

22. The Plaintiff intends to seek leave from the Court to apply Rule 234(1) to permit both oral examinations and written examinations.

23. The Plaintiff intends to begin with written examinations of all the Defendants, followed by oral examinations if the Plaintiff deems necessary and estimates that, subject to undertakings and refusals, these oral examinations will take one (1) day for each Defendant.

24. The Plaintiff may ask the court for an order allowing them to examine multiple representatives of each of the Defendants, if necessary.

CLARIFICATION OF THE COMMON ISSUES

25. Following certification, examinations for discovery, and the exchange of expert opinions, if any, and before the trial of the common issues, the Plaintiff may ask the court for an order to clarify and/or redefine the common issues, if required.

MOTIONS

26. Although the Plaintiff does not currently anticipate any post-certification motions other than those indicated in this plan, additional motions may be required and will be scheduled as the case progresses.

TRIAL OF THE COMMON ISSUES

27. The Plaintiff will ask the Court to hold the trial of the common issues as soon as the Court permits.

28. The Plaintiff intends to try the common issues under the Federal Court's Summary Judgment and Summary Trial rules.

29. The Plaintiff intends to request the Court to order that the Defendants pay monies into Court either before or after the trial of the common issues.

THE FOLLOWING TERMS OF THIS LITIGATION PLAN PRESUPPOSE THAT THE COURT DETERMINES THE COMMON ISSUES RELATING TO LIABILITY IN FAVOUR OF THE CLASS

30. Assuming that the common issues are resolved by judgment in favour of the Class, the Plaintiff will ask the judge at the common issues trial to make the necessary orders to allow the Class to proceed with the balance of the action in the manner set out below.

31. The Plaintiff will ask the court to award damages to the Class Members in the following manner or such other manner as the court may direct:

- a) an aggregate monetary award payable to the Class during the applicable class period, pursuant to Rule 334.28 of the *Federal Court Rules*;
- b) any applicable pre-judgment and/or post-judgment interest for the above amounts; and
- c) costs for this proceeding, if this Court permits.

NOTICE OF RESOLUTION OF COMMON ISSUES

32. The representative plaintiff will ask the Court to:

- a) settle the form and content of a notice of resolution of the common issues (the "**Notice of Resolution**");
- b) order that the Notice of Resolution be distributed substantially in accordance with the Notice Program set out at paragraph 19, except that the Notice of Resolution shall not be sent to any Class Member who validly opted out in accordance with the procedure set out therein;
- c) order that each Class Members' share of damages in paragraph 30 above, less the Class Counsel Fees (defined further below), be distributed to each Class Members' credit cards or other form of payment the Class Members used to pay for their air tickets, pursuant to the Automated Distribution Method (defined further below); and
- d) order that the costs of the distribution of the Notice of Resolution be paid by the defendants.

SUPERVISION BY THE COURT

33. Pursuant to Rule 334.26 of the *Federal Court Rules*, the judge at the trial of the common issues will be asked to make orders as are necessary to determine any remaining issues not determined at the common issues trial, if any. Without limiting the generality of the foregoing, the Court will be asked to:

- a) appoint one or more persons to evaluate any remaining issues and report back to the judge;
- b) direct any remaining questions be determined in a practical manner, consistent with the principle of proportionality;
- c) approve automated methods of distribution for any damages payable to Class Members, pursuant to the Automated Distribution Method (defined further below);
- d) settle the Claim Form, both in web format and paper-based format, for any Class Members that are required to submit a claim rather than using the Automated Distribution Method;
- e) set a claims deadline by which date the remaining claimants will be required to file their claims ("**Claims Bar Deadline**");
- f) appoint a court-approved (the "**Administrator**") to hold any monies recovered at the common issues trial and to implement the distribution plan by, among other things, receiving and evaluating Claim Forms in accordance with

protocols approved by the Court, supervising the distribution of funds to Class Members, and supervising the defendants' plans for devising an automated method; and

- g) order the defendants to provide the Administrator with electronic lists of the Class Members including contact information.

AUTOMATED DISTRIBUTION METHOD

- 34. For Class Members that have a method of payment stored in their online accounts with a Defendant, that Defendant shall devise a method for paying any monetary amounts owing to each Class Member to that method of payment and upon successful payment, notifying Class Members of the payment.
- 35. The Administrator shall supervise the automated distribution including the methods the defendant uses to identify the Class Members and distribute money.
- 36. Class Members who do not have a method of payment specified, or if the funds are returned to the defendant from the financial institution, those Class Members will be given notice via e-mail and post mail to submit a Claim Form.

THE CLAIM FORM

- 37. The Claim Form shall be deemed to be a Statement of Claim and the claimant must deliver a completed Claim Form to the Administrator before the Claims Bar Deadline.
- 38. In and with the Claim Form, the claimant will, among other things:
 - a) assert the basis of his or her eligibility as a Class Member;
 - b) provide adequate proof of having reserved the subject flight, unless such information is available on the defendant's records; and
 - c) and any further compensation (such as the full costs of booking alternative travel, lost accommodations, or additional accommodations to fulfill the original itinerary), in addition to the aggregate monetary relief, that the Class Member seeks to claim.

THE ADMINISTRATOR'S DECISION ON ELIGIBILITY

- 39. The Plaintiff will ask the court for an order pursuant to Rule 334.26-334.27 and 334.28(3) to appoint an administrator for assessing the Claim Forms and to apply a special mode of proof that is proportional to the amount(s) at stake.

40. The Administrator shall determine, based on information submitted in the Claim Form, whether or not a claimant is a Class Member who is entitled to claim under this plan and any amounts owing for each of the Class Members.
41. The decision of the Administrator shall be in writing and the Administrator shall send a copy of the decision to the claimant and the defendants.

THE DISTRIBUTION PROCESS

42. As soon as practicable after the Claims Bar Deadline, on notice to Class Counsel and the Defendants, report to the Court the proposed distribution for each Class Member including any pre- and post-judgment interest award that has been paid to the Administrator.
43. If there is no overall settlement with the Defendant and each claim must be proven and assessed individually, then the Defendants should be required to pay to the Administrator the amount of each judgment immediately after each report becomes final. The Administrator shall hold this money in trust and invest it as the Court directs.
44. If a lump sum is recovered from the defendants at the common issues trial, no distribution to eligible Class Members shall be made until authorized by the Court. The Administrator may make an interim distribution if authorized by the Court.
45. Each eligible Class Member shall electronically or physically sign such documents as the Administrator may require in accordance with any protocol approved by the Court as a condition precedent to receiving any distribution.

INSUFFICIENT RECOVERED MONIES

46. In the event the defendants do not pay the judgments in full, the Court will be asked to give further directions to ensure that there are no priorities among eligible Class Members.

CY-PRES DISTRIBUTION

47. If there is a residue from the recovered monies, (and any interest that has accrued thereon) after payment of all legal fees and expenses and administrative costs, the Court will be asked to authorize that this residue be distributed cy-pres for consumer protection education and advocacy. This distribution would indirectly benefit Class Members who cannot be located or did not submit a claim. The cy-pres distribution shall be paid in such manner to such recipients and in such proportions as the Court may decide at a further motion. The defendants will be given notice of this motion.

CLASS COUNSEL FEES AND ADMINISTRATION EXPENSES

48. The Court will be asked to fix the amount of Class Counsel fees, disbursements and applicable taxes ("**Class Counsel Fees**"). Class Counsel will ask the Court to direct the Administrator and defendants to pay the Class Counsel Fees out of the monies recovered or owing as a first charge.
49. The Court will be asked to fix the costs of the persons appointed to implement and oversee the Plan such as the Administrator and to order payment of these costs as a second charge any monies paid by the Defendants.

FINAL REPORT

50. After the Administrator makes the final distribution to Class Members and to any *cy-pres* recipients, the Administrator shall make its final report to the Court in such manner as the Court directs and the Court will be asked to then discharge the Administrator.

REVIEW OF THE LITIGATION PLAN

51. This plan will be reconsidered and may be revised under the continuing case management authority of the Court, if required, both before and after the determination of the common issues.